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5 UNITED STATES BANKRUPTCY COURT
6 EASTERN DISTRICT OF WASHINGTON

7 In re:

8 CLARE HOUSE BUNGALOW HOMES,)
9 L.L.C.,)
Debtor.)

No. 09-04651-PCW11

10 CLARE HOUSE BUNGALOW HOMES)
11 RESIDENTS ASSOCIATION,)
12 Plaintiff,)

Adv. No. 09-80164-PCW11

13 vs.)

14 CLARE HOUSE BUNGALOW HOMES,)
15 L.L.C., a Washington limited liability)
company, et al.,)
16 Defendants.)

MEMORANDUM DECISION RE:
DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT AND RESPECTIVE JOINDERS
AND PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

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18 This adversary arose from a state court law suit against Clare House Bungalow Homes, L.L.C.
19 (hereinafter "Clare House") and various entities which hold liens or Deeds of Trust on the real estate
20 of Clare House. The state court complaint seeks a determination that the interests of the members of
21 the plaintiff association who are residents of the 24 of 28 living units owned and managed by Clare
22 House are superior to the interests of the defendants. The state court action was a classic quiet title
23 action and sought to restrain the foreclosure sale then pending by defendant Caudill Living Trust, which
24 holds a Deed of Trust on the real property (hereinafter "Caudill Deed of Trust"). Counterclaims were
25 filed by Caudill Living Trust which alleged that the actions of the plaintiff association and its members
26 constitute slander of title and that the filing of the Lis Pendens on the real property records at the time
27 of commencement of the state court action was wrongful. It seeks damages on those counterclaims.
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MEMORANDUM DECISION RE: . . . - 1

1 Clare House filed a Chapter 11 bankruptcy proceeding on August 20, 2009 under case No. 09-
2 04651-PCW11 and the state court quiet title action was removed to this court. That bankruptcy
3 proceeding was dismissed on April 13, 2010, but Clare House commenced a second chapter 11
4 proceeding on June 10, 2010 under case No. 10-03507-PCW11. The debtor's proposed plan is not yet
5 confirmed. None of the defendants in this adversary have sought to lift the automatic bankruptcy stay.
6 Jurisdiction exists under 28 U.S.C. § 1334(b) as the real estate involved in the controversy constitutes
7 property of the bankruptcy estate.

8 The pending motion for summary judgment (Docket No. 88) and joinders (Docket Nos. 95 and
9 98) brought by the defendants simplistically allege their interests are superior to those of the members
10 of the plaintiff association. The plaintiff association's cross motion for summary judgment (Docket No.
11 101) alleges that its members hold interests superior to those of the defendants.

12 Clare House is best described as a senior living facility. Residents must be 55 or older to occupy
13 the individual units. Each unit is the subject of a Resident Agreement. The terms of the individual
14 Resident Agreements generally provide that upon occupancy the Resident pays a lump sum for the right
15 to occupy the premises until death, at which time some percentage of that lump sum is returned to the
16 Resident's estate. The lump sum paid and the percentage of the amount returned varies from unit-to-
17 unit and some of the terms within the agreements, which terms are not material to resolution of these
18 motions, vary. Resolution of the current issues requires an interpretation of the standard provisions of
19 the Resident Agreements.

20 The Caudill Deed of Trust and the Deeds of Trust or liens of the other named defendants were
21 recorded or arose after two of the Residents recorded their Resident Agreements with the Spokane
22 County Auditor's Office in the public real estate records. Those are Residents Raun and Hoffman.
23 None of the other Resident Agreements were recorded.

24 Several legal issues are presented in the pending motions.

- 25 1. Do the individual members of the plaintiff association have standing to maintain this
26 action, i.e., do they have an interest in real property?
- 27 2. Does the plaintiff association have standing to maintain this action?
- 28 3. If the Residents have an interest in real property, is that interest superior to the interest

1 of the defendants?

2 4. Did the commencement of the quiet title action constitute slander of title?

3 5. Was the filing of the Lis Pendens wrongful?

4 **INTEREST IN REAL PROPERTY**

5 The resolution of the issues in the case cannot be addressed until the underlying issue of the
6 nature of the rights of the members of the plaintiff association [or “Residents”] has been resolved.
7 Defendants maintain that the individual residents who are members of the association do not have a
8 property interest that will provide the Residents (either individually or through the plaintiff association)
9 standing to bring this lawsuit. Defendants further argue that the lack of a property interest also prevents
10 the Residents from prevailing on their claim to quiet title. Defendants argue that the attributes of
11 property ownership, i.e., the right to possess and enjoy property and the right to exclude others, does not
12 imbue the Residents with title or ownership of property, and lacking a title or ownership interest, the
13 Residents lack standing to sue. Before addressing the issue of standing, and indeed before addressing
14 various other issues in the current motion, the nature of the interest granted in the Resident Agreements
15 must be determined.

16 1. The right to occupy is an interest in real property.

17 The pivotal issue in this case is whether the Resident Agreements grant the Residents a real
18 property interest. The Resident Agreement on page 1 states “[r]esident’s right to occupy the Unit is the
19 subject of this Agreement.” Clare House is obligated to make the specific unit available for the
20 exclusive occupancy of each specific Resident and common areas available for non-exclusive use so
21 long as the Resident qualifies for occupancy such as by paying monthly utility and other fees. Paragraph
22 9 of the Resident Agreement states:

23 So long as Resident shall fulfill all of his/her obligations under this Agreement, Resident
24 shall be entitled to the full right of occupancy together with such other rights as are
25 stated in this Agreement. However, nothing in this provision or elsewhere in this
Agreement shall be construed as creating or acknowledging an interest in real property
in favor of Resident.

26 (a) This Agreement and the Resident’s interest as it is described in this
27 Agreement, at Clare House’s option, shall be subordinate to any
28 mortgage, deed of trust, or any other hypothecation for security now or
hereafter placed upon the real property of which the Premises are a part
and to any advance(s) made on the security thereof and to all renewals,
modifications, consolidations, replacements and extensions thereof.

1 Notwithstanding such subordination, Resident's right to occupy the Unit
2 shall not be disturbed so long as Resident shall pay fees, observe and
3 perform all of the provisions of this Agreement.

- 4 (b) Resident specifically agrees, upon written request by Clare House, that
5 Resident shall execute and deliver to Clare House any documents of
6 subordination and/or attornment required by Clare House or otherwise
7 necessitated as a condition of project financing or otherwise; failure of
8 the Resident to do so shall constitute a material breach of this
9 Agreement; PROVIDED FURTHER, however, that in the event of
10 Resident's continuing failure to execute any required documentation
11 evidencing subordination and/or attornment ten (10) days following
12 written demand, Resident does hereby make, constitute and irrevocably
13 appoint Clare House attorney-in-fact in Resident's name, place and stead,
14 to execute any and all documents of subordination and/or attornment.
15 This appointment is coupled with an interest.

16 The Resident Agreement terminates upon the death of the Resident or upon certain other
17 conditions not relevant to this controversy, such as the failure to pay utility fees. Upon termination of
18 the Resident Agreement, the Resident must surrender possession of the unit. Paragraph 3 of the
19 Resident Agreement provides that "[u]pon termination of this agreement, . . . Resident shall receive"
20 a specific percentage of the initial Occupancy Fee paid by the Resident.

21 Do the rights granted the Residents in the Resident Agreement constitute an interest in real
22 property or merely contract rights which are personal property rights? It is hornbook law that the
23 exclusive right to occupy and possess real property is a fundamental property right. 72 C.J.S. *Property*
24 § 2 (2010).

25 Real property carries with it a bundle of rights and one of the fundamental rights in that bundle
26 is ownership. Another fundamental right in that bundle of rights is the right to possession and
27 enjoyment of the property. When a written contract grants the right of possession of real property, the
28 contract grants a real property interest. The right to possession may be temporary, it may be subject to
29 certain conditions, and it may be inferior to other rights in the bundle, but it is an interest in real
30 property. Manufactured Housing Communities of Washington v. State, 142 Wn.2d 347, 13 P.3d 183
31 (2000).

32 In this situation, the Resident Agreement contains a statement to the effect that it cannot be
33 construed as creating an interest in real property. Since it concerns the person's right to occupy real
34 property, what other kind of interest could it be creating? Could the parties to a Deed of Trust add a

1 sentence stating that the Deed of Trust cannot be construed as creating an interest in real property and
2 then argue that no property interest has been granted? Such a result would be absurd and contrary to
3 decades of real property law. Just as labeling a transaction as a “lease” does not change the inherent sale
4 nature of the transaction, stating that a contract does not grant an interest in real property cannot change
5 the inherent nature of the contract. Labels cannot change the true nature of the underlying principal that
6 occupancy is a property right.

7 2. The right to a payment is not an interest in real property.

8 The real property interest consists of the right to occupy and the right of possession. That right
9 terminates upon the death of the Resident. Conceptually, this is similar to a life estate in real property
10 which terminates upon the death of the grantee. Like a life estate, the Resident Agreement does not
11 grant all the rights in the bundle of property rights, but only certain rights. Paragraph 12(b) of the
12 Resident Agreement provides that it shall terminate upon “[t]he death of the Resident(s), (in the case
13 of married persons, this agreement shall terminate on the death of both Residents).”

14 The obligation to reimburse a percentage of the Occupancy Fee initially paid by the Resident
15 which obligation is set forth in Paragraph 3 arises only “[u]pon termination of this Agreement”
16 In other words, the right to occupy, which is the property interest granted in the Resident Agreement,
17 expires upon the death of the Resident. After expiration of the real property interest, there remains in
18 the Resident Agreement an obligation to pay money. That obligation is not an interest in real property.
19 It does not arise until after termination of the real property interest. It is a contractual obligation
20 enforceable by the parties to the contract, but which is unrelated to the then no longer existing property
21 right.

22 **STANDING**

23 Defendants have raised two issues as to the plaintiff association’s standing to appear and be
24 heard in this proceeding. The first is whether the individual Residents have a sufficient property interest
25 to demonstrate standing, and the second is whether the association can qualify as an association to
26 represent the individual Resident’s interests collectively in this proceeding. Having determined that the
27 Residents have an interest in real property, each resident would have standing to bring an action to quiet
28 title. Where one has a valid interest in the real estate and the right to take possession of the property,

1 one has a valid subsisting interest in the property. Duckworth v. Michel, 172 Wash. 234, 19 P.2d 914
2 (1933).

3 The standing issue then to be addressed is whether the plaintiff association has standing to bring
4 suit on behalf of its members.

5 An association has standing to bring suit on behalf of its members when the following
6 criteria has been satisfied: 1) the members of the organization would otherwise have
7 standing to sue in their own right; 2) the interests that the organization seeks to protect
are germane to its purpose; and 3) neither claim asserted nor relief requested requires the
participation of the organization's individual members.

8 International Ass'n of Firefighters, Local 1789 v. Spokane Airports, 146 Wn.2d 207, 45 P.3d 186
9 (2002).

10 In the case before the court, each Resident was granted the right of possession and the right to
11 exclude others pursuant to the terms of the Resident Agreements. As that Agreement grants a property
12 interest to each member of the plaintiff association, the first element of the criteria is satisfied. The
13 second element is also satisfied as the Declaration of John R. Zeimantz (Docket No. 109) states that
14 the plaintiff association was created for the express purpose of defending the rights and interests of the
15 Residents in this litigation, which satisfies the second element. Finally, none of the individual Residents
16 have appeared in this litigation in their individual capacity, nor do they need to so appear. A quiet title
17 action that involves property with a common interest to many persons may be brought by one, where
18 it is impracticable to bring all before the court. Wm. D. Perkins & Co. v. Diking Dist. No. 3 of Island
19 County, 162 Wash. 227, 298 P. 462 (1931). An association composed of such persons may also appear
20 in such an action.

21 SLANDER OF TITLE COUNTERCLAIM

22 Defendants seek summary judgment on the counterclaim for slander of title. RCW 7.28.010
23 states that "[a]ny person having a valid subsisting interest in real property, and a right to the possession
24 thereof, may recover the same by action in the superior court of the proper county"

25 Clearly under the Resident Agreement, the members of the plaintiff association have an
26 exclusive right to possession of their specific units and the non-exclusive rights of use of the common
27 areas. That right of possession is statutorily sufficient to commence a quiet title action. The statute
28 grants them authority to commence a quiet title action.

1 To prevail on a claim for slander of title, the claimant must demonstrate evidence which meets
2 four elements: (1) the statements made by the members of the plaintiff regarding their interest in the
3 property were false; (2) the statements that they held an interest in real estate superior to the interest of
4 the defendants were made maliciously; (3) the statements were made in connection with a pending or
5 prospective conveyance of the real property; and (4) the claimant suffered some pecuniary loss resulting
6 from the statements.

7 In this situation, there is no dispute that the Residents have the right to possession. The members
8 of the plaintiff association alleged in their complaint that not only do they have the right of possession,
9 but also that they hold an interest in the real property which is legally and equitably superior to those
10 of the defendants. This is the statement that the defendants allege is false. Even assuming this court
11 had determined that the Residents do not hold an interest in real property, the second element necessary
12 to slander of title cannot be met.

13 The court in Brown v. Safeway Stores, Inc., 94 Wn.2d 359, 617 P.2d 704 (1980) at page 375
14 stated:

15 Malice is not present where the allegedly slanderous statements were made in good faith
16 and were prompted by a reasonable belief in their veracity. The initiation of litigation to
17 determine the rights of the respective parties to a lease cannot, without more, be
18 characterized as malicious conduct. (Citations omitted.)

19 There is no evidence that the plaintiff association brought the quiet title action maliciously or
20 through any improper motive. Under the circumstances of the situation, it is apparent that a bonafide
21 dispute existed as to the nature of the rights of the Residents and the priority of those rights vis-a-vis the
22 defendants.

23 **WRONGFUL RECORDING OF A LIS PENDENS**

24 The defendants also allege a counterclaim and damages based upon the fact that the plaintiff
25 association recorded contemporaneously with the commencement of the quiet title action a notice of lis
26 pendens. Such a document is merely notice to the world that litigation exists which may affect title to
27 or rights in the real property. Such documents may be filed by lien holders, receivers or others claiming
28 an interest in the real property who are parties to litigation concerning that real property. RCW 4.28.320
and .328.

1 Even assuming that the plaintiff association's contention that it held an interest in the real estate
2 had been proven incorrect, the plaintiff association had substantial justification for recording the lis
3 pendens. Indeed, when a party to litigation concerning rights in real property fails to file a lis pendens,
4 there is a risk that a bonafide purchaser or someone dealing in the property will obtain rights superior
5 to the litigant due to the failure to file a lis pendens. 57 AM. JUR. 2D *Lis Pendens* § 3 (2010).

6 **PRIORITY OF INTERESTS**

7 As the members of the plaintiff association hold a property interest, the issue then becomes one
8 of priority. As between the Residents and defendants, who holds the superior interest? Should one of
9 the defendants foreclose its Deed of Trust or lien, what rights, if any, of the Residents would be inferior
10 and thus be terminated by a foreclosure?

11 1. Rights of those Residents who recorded their agreements.

12 Having determined that the members of the plaintiff association acquired interests in real
13 property pursuant to the Resident Agreement, the question then becomes one of priority. Are the
14 interests of the Residents superior to the property interests held by the defendants pursuant to their
15 Deeds of Trust and liens? The answer to this question requires a distinction between the Residents who
16 recorded their Resident Agreement in the real property records and those who did not.

17 Washington law provides for the recording of interest in real property in the office of the County
18 Auditor in which the real property is located. Generally, unrecorded conveyances of an interest in real
19 property are void as to any later purchaser or entity encumbering the property. RCW 65.08.070;
20 Ellingsen v. Franklin County, 117 Wn.2d 24, 810 P.2d 910 (1991). A proper recording of a document
21 in the real property records is notice to the world of the conveyance of that particular property interest.
22 Any later person dealing with the bundle of rights associated with that real estate has notice of the
23 conveyance contained in the recorded document and takes subject to it. Essentially, if one has notice
24 of another's interest in real property, one takes an interest which is inferior to the other person's interest.

25 All of the defendants acquired their interest in the real property under the applicable Deed of
26 Trust or lien after December 20, 2001 and March 21, 2002, which were the dates of the respective
27 recording of the Resident Agreements of Raun and Hoffman. Thus, the interests of all defendants are
28 inferior to the real property interests of those two Residents, which real property interests are the right

1 to occupancy and possession.

2 2. Rights of Residents who did not record their agreements.

3 Recording under RCW 65.04 and .08 is not the exclusive manner of providing notice of an
4 interest in real property. Actual notice could be given to a third party or more typically, circumstances
5 may exist which give rise to constructive notice. In this controversy, the members of the plaintiff
6 association argue that the defendants had actual knowledge of the occupancy of the units by the
7 Residents and knew that the real property was used as a senior living facility. Under Washington law,
8 knowledge of occupancy of real property by someone other than the owner of the property gives rise to
9 a duty to inquire. That knowledge requires some inquiry into the circumstances giving rise to the
10 occupancy. Scott v. Woolard, 12 Wn. App. 109, 529 P.2d 30 (1974), Glaser v. Holdorf, 56 Wn.2d 204,
11 352 P.2d 212 (1960) and Nichols v. De Britz, 178 Wash. 375, 35 P.2d 29 (1934).

12 Evidence has not yet been presented as to the actual knowledge of each particular defendant at
13 the time that defendant's interest in the property arose. Nor has evidence been presented as to what
14 inquiries, if any, were made by each defendant. Undoubtedly, issues of material fact exist as to the
15 circumstances surrounding each defendant's knowledge at the relevant time. The determination of
16 whether any defendant had constructive notice of the interest in real property held by the Residents,
17 including the effect of the recording of the two Resident Agreements, must await trial.

18 Thus, the conclusion is that the right to occupy and possess held by Residents Raun and Hoffman
19 is superior to the interests of the defendants. As to the right to occupy and possess held by other
20 Residents, the priority of those interests vis-a-vis each defendant must be determined at trial.

21 3. Did all Residents subordinate their interests to defendants?

22 As stated above, the Resident Agreement contains a provision in paragraph 9(b) which requires
23 Residents to execute written agreements subordinating their interest to any creditor or third party at the
24 request of Clare House. No such request was ever made to any Resident. No written subordination
25 agreements exist, and there was no duty on the part of any Resident to execute such an agreement as the
26 prerequisite request was not made.

27 The defendants argue that pursuant to subsection (a) of paragraph 9, no such separate written
28 agreements were necessary as the terms of the Resident Agreement itself subordinated the interests of

1 the Residents to later interests such as the defendants. The first sentence of (a) does state that the
2 interests of the Residents “shall be subordinate to any mortgage, deed of trust” However, the
3 second sentence then states that “[r]esident’s right to occupy the Unit should not be disturbed” By
4 agreeing to this provision, the Residents subordinated some rights to Deed of Trust holders, but that
5 subordination was limited as the Residents’ right to occupancy continued and survived the
6 subordination. The right to occupancy was not affected by the subordination as it was not “disturbed.”

7 **CONCLUSION**

8 The plaintiff association’s Motion for Summary Judgment (Docket No. 101) is **GRANTED IN**
9 **PART** to the extent it determines that the Resident Agreements granted an interest in real property to
10 the Residents. That interest is the exclusive right to occupy and use the particular unit of each Resident
11 and the non-exclusive right of use of the common areas. The right to receive a monetary sum which
12 arises after termination of the property interest is a personal contract right. Those real property interests
13 of Residents Raun and Hoffman who recorded their agreements in the real property records are superior
14 to the rights of the defendants. As to the other Residents, the priority or superiority of their rights vis-a-
15 vis the defendants must be determined at trial.

16 The defendants’ Motion for Summary Judgment (Docket No. 88) seeking dismissal of the
17 plaintiff association’s causes of action must be **DENIED** as is the defendants’ request for an award of
18 damages and attorney fees based upon the counterclaims of slander of title and wrongful filing of a lis
19 pendens. Said counterclaims must be **DISMISSED**.

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27 Patricia C. Williams
28 Bankruptcy Judge

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